Supreme Court, U.S.
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UNITED STATES SUPREME COURT

OCTOBER, 1997

ALANA SUDWISHER

VERSUS

ESTATE OF PAUL C. HOFFPAUIR, ET AL

ON WRIT OF CERTIORARI BY THE LOUISIANA

STATE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Does Louisiana Civil Code Article 209 require an unconstitutional burden by requiring Alana Sudwisher to prove filiation by clear and convincing evidence because her alleged father is deceased, when that same statute only requires proof by a preponderance of the evidence to an alleged living parent?

Does the creation of two classes of illegitimates and the imposition of different burdens of proof deprive Alana Sudwisher of equal protection under the Equal Protection Clause of the United States Constitution?

LIST OF ALL PARTIES

PLAINTIFF:

ALANA SUDWISHER

DEFENDANT:

ESTATE OF PAUL C. HOFFPAUIR

PAUL C. HOFFPAUIR, JR., CO-TESTAMENTARY EXECUTOR OF THE ESTATE OF PAUL C. HOFFPAUIR

PAUL C. HOFFPAUIR, JR.

ROSEMARY HOFFPAUIR SCHUH

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TABLE OF AUTHORITIES

I. CONSTITUTIONAL PROVISIONS

1. U.S. CONSTITUTION AMENDMENT XIV-SECTION 1 CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION;

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. STATUTES

1. LOUISIANA CIVIL CODE ARTICLE 209 Proof of filiation.

A. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by

legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged living parent by a preponderance of the evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this article.

B. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged deceased parent by clear and convincing evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided by this article.

III. CASES

Succession of Brown, 388 So.2d 1151 (La. 1980)

Trimble v. Gordon, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977)

Lalli v. Lalli, 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978)

GROUNDS ON WHICH JURISDICTION IS INVOKED

The date of the entry of the Louisiana Supreme Court's denial of the Application for Rehearing, January 30, 1998.

The jurisdiction of this Honorable Court is based on 28 USC Section 1257 (a):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United State."

CONSTITUTIONAL PROVISIONS

1. U.S. CONSTITUTION AMENDMENT XIV-SECTION 1 CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION;

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a case previously considered by this Honorable Court in *Estate of Hoffpauir, et al v. Sudwisher, Alana,* 91-1248. On March 26, 1981, Alana Sudwisher filed suit under a newly enacted Louisiana Civil Code Article 209, seeking filiation to Paul Hoffpauir, who had died several years earlier, claiming to be his child and thus entitled to a portion of his estate. With the advent of DNA technology plaintiff, Alana Sudwisher, sought to compel a blood test from the legitimate daughter of the deceased, Paul Hoffpauir, Rosemary Hoffpauir Schuh. The Louisiana Supreme Court ultimately compelled Rosemary to submit to a blood test and this Honorable Court, after requesting rebuttal briefs and careful consideration, ultimately denied the writs filed by the Estate of Paul Hoffpauir.

At trial Alana Sudwisher testified that at age seventeen (17) a meeting was arranged whereby she first met Paul Hoffpauir who introduced himself as her father. The meeting took place in the year 1969. Subsequent to that initial meeting,

Paul Hoffpauir established a relationship with Alana, visiting her home and taking her on trips to his farm in Ragley, Louisiana, when his family was away. The relationship lasted for several years until Alana moved away from Louisiana. Shortly after Alana's return to Crowley, Louisiana, Paul Hoffpauir suffered a stroke. She was able to visit him only once in his home before his death. In 1981, shortly after the Louisiana Supreme Court in the *Succession of Brown*, 388 So. 2d 1151 (La. 1980), recognized the rights of illegitimates to inherit and the enactment of Civil Code Article 209 providing the procedure for proceeding with a filiation action, Alana Sudwisher instituted this lawsuit. At the time the suit was filed, Civil Code Article 209 provided that a child not entitled to legitimate filiation could prove filiation by a preponderance of the evidence. One year after the lawsuit was filed, in 1982, the Louisiana Legislature amended Civil Code Article 209 to in essence create two (2) classes of illegitimates. A child seeking legitimate filiation to a living parent was allowed to prove filiation by a preponderance

of the evidence. The level of proof was elevated for a child seeking legitimate filiation to a deceased parent, requiring proof by clear and convincing evidence.

The District Court found that "although it may be possible that the events occurred as described by the plaintiff, and that it may even be probable, but it certainly was not clearly and convincingly established." Based on those findings the Court ruled against Alana. Ultimately, the Louisiana Supreme Court, after granting writs of review, ruled that clear and convincing evidence was the applicable standard and that the 1982 amendment to the statute increasing the burden was in fact procedural and therefore retroactive. The Court further ruled that the clear and convincing requirement did not violate Alana's constitutional rights.

RESPECTFULLY SUBMITTED,

BY STEHEN A. STEFANSKI

STAGE OF THE PROCEEDINGS IN WHICH CONSTITUTIONAL QUESTIONS WERE RAISED

1) Constitutional issues were raised in a supplemental and amending petition filed in the Fifteenth Judicial District Court, Acadia Parish, Louisiana. The Fifteenth Judicial District Court ruled that the statute in question did not violate Alana Sudwisher's constitutional rights; the issue was the constitutional issue of the denial of equal protection was then raised on appeal to the Third Circuit Court of Appeal, State of Louisiana. The Third Circuit Court of Appeal ruled that Alana Sudwisher's rights under the equal protection clause were not violated.

2) The issue of the violation of Alana Sudwisher's constitutional rights of equal protection was again raised in writs or certiorari to the Louisiana Supreme Court and ruled upon by the Louisiana Supreme Court in its judgment holding that Alana Sudwisher's

constitutional rights under the equal protection clause were not violated in requiring her to prove her case by clear and convincing evidence since the alleged father was deceased, whereas the statute in question, La. Civ. Code art. 209, required only preponderance of the evidence for proof of filiation to an alleged living parent. *See decision of the Louisiana Supreme Court in the appendix.*

3) Since the constitutionality of Louisiana Civil Code Art. 209 is drawn into question, 28 U.S.C. 2403 (B) may apply and accordingly this petition for writ of certiorari shall be served on the Attorney General of the State of Louisiana, the Honorable Richard P. Ieyoub.

ARGUMENT

Alana Sudwisher, in this long fight to establish her filiation, has prosecuted this case through the jurisprudential evolution which has followed this Court's recognition of an illegitimate's right to seek filiation.

Alana has consistently maintained that the Louisiana Legislature violated her constitutional rights under the Equal Protection Clause.

Louisiana Civil Code Article 209 amended in 1982, one (1) year after Alana filed her lawsuit, provided:

> Art. 209. Proof of filiation.
> A. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged living parent by a preponderance of the evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this article.
>
> B. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged deceased parent by clear and

> convincing evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided by this article.

In doing so, the Louisiana Legislature in effect created two (2) classes of illegitimates.

Because Paul Hoffpauir was deceased, Alana, who when the lawsuit was filed was only required to prove filiation by a preponderance of the evidence, was now, as a result of the amendment required to present "clear and convincing evidence" of a relationship to Paul Hoffpauir.

Alana argues that this discrimination between the two (2) classes of illegitimates is not substantially related to a permissible State interest.

With DNA technology proof of filiation is almost 100 percent when genetic blood tests can be obtained from the child, the mother and the alleged living father. The fears which may have existed when this statute was enacted, that a deceased father can not defend himself no longer exists. As a matter of fact the situation is now completely reversed -- it is

much easier to prove filiation to a living alleged father than to a deceased alleged father from whom we can not obtain an uncontaminated blood sample. There is then no reason to discriminate between the classes of illegitimates.

In *Trimble v. Gordon,* 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977), this Court established a standard of judicial review, demanding more than "a mere finding of some remote relationship between the statute and a legitimate state purpose."

> "Traditional equal protection analysis asks whether this statutory differentiation on the basis of illegitimacy is justified by the promotion of recognized state objectives. If a law cannot be sustained on this analysis, it is not clear how it can be saved by the absence of an insurmountable barrier to inheritance under other and hypothetical circumstances." *Trimble, supra,* at 1467.

In *Lalli v. Lalli,* 439 U.S. 259, 99 S. Ct. 518, 58 L.Ed.2d 503 (1978), this Honorable Court further contrasted different state statutes and, again, although conceding that states have the right to properly provide for the orderly

disposition of property, mandated that it must be substantially related to permissible state interests.

When balancing the rights of individuals, in this case illegitimates, against the state's rights to enact property laws, the rights of the individual should be paramount unless there is a rational and logical reason to enact a discriminatory statute. Because scientific technology as it existed at the time this case was tried and the constitutional issued raised, clearly made it easier to prove filiation to a living parent than to a deceased one, the increased burden of clear and convincing evidence should have been found to have been a violation of Alana Sudwisher's rights of equal protection, the Fourteenth Amendment to the United State Constitution.

CONCLUSION

Louisiana Civil Code Article 209 places an exceptional burden on a person seeking filiation to an alleged deceased parent -- to prove filiation by clear and convincing evidence. This burden is discriminatory because there is no longer any

legitimate State need to distinguish between two (2) classes of illegitimates seeking filiation, because of the dramatic change in the proof of paternity brought about with the advent of DNA blood test technology.

Respectfully Submitted,

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APPENDIX A

SUPREME COURT OF LOUSIANA

FOR IMMEDIATE NEW RELEASE

NEWS RELEASE # 007

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the **30th day of January, 1998,** the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARINGS DENIED:

96-KA-1660	STATE OF LOUISIANA v. JAMES S. BALDWIN IV (Parish of DeSoto) KIMBALL, J. -- not on panel.
97-C-0785	ALANA SUDWISHER v. ESTATE OF PAUL C. HOFFPAUIR, et al (Parish of Acadia) CALOGERO C.J.--would grant the writ. LEMMON, J. -- would grant the writ. KIMBALL, J. -- not on panel.

APPENDIX B

DEC 12 1997

SUPREME COURT OF LOUISIANA

No. 97-C-0785

ALANA SUDWISHER

Versus

ESTATE OF PAUL C. HOFFPAUIR

LEMMON, J., Dissenting

The majority notes that while a legislative amendment depriving an illegitimate child of her right to prove filiation would be substantive and prosepctive only, an amendment increasing the degree of proof necessary to prove filiation is procedural and may be applied retroactively. I disagree. Before the amendment, this plaintiff had the right to inherit from ther alleged father if her evidence of filiation met the preponderance of the evidence standard (which is arguably did). The legislative amendment changing the burden of proof was certianly substantive to her because it cost her the right ot

inherit. If the party bearing the burden of proof would have the right to inherit under the preamendment statute, but no longer has that right under the amended statute, what could be more substantive? A legislative increase in the quantum of necessary evidence I analogous to adding an additional element to the claimant's cause of action, which cannot conceivably be construed as non-substantive.

If the amendment in the present case had shifted the burden of proof to the defendant, certainly the succession would be here screaming that the change was substantive. I fail to see the difference between an amendment shifting the burden of proof to the defendant and an amendment maintaining the burden of proof on the plaintiff but increasing (or doubling or tripling) that burden of proof. A law which makes the enforcement of a right dependant upon the production of certain evidence or upon proof of a specified amount or type of evidence logically is a substantive law.

The plaintiff in the present case did not meet her

burden of proof under the clear and convincing standard applied by the majority. However, since the amendment is substantive, the pre-amendment burden of proof should apply. I would remand the case to the trial court to apply the preponderance of the evidence standard in this bench trial; alternatively, this court should review the record under the proper standard.

APPENDIX C

DEC 12 1997

SUPREME COURT OF LOUISIANA
NO. 97-C-0785
ALANA SUDWISHER
versus
ESTATE OF PAUL C. HOFFPAUIR, ET AL
****
ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD CIRCUIT, PARISH OF ACADIA
****
JEFFREY P. VICTORY

JUSTICE

We granted a writ in this filiation case to determine whether the burden of proof found in La.C.C. art. 209, which requires that a child prove filiation to a deceased parent by clear and convincing evidence while requiring that a child only prove filiation to a living parent by a preponderance of the evidence, is procedural and thus retroactive, and whether the heightened burden of proof for one class of illegitimates violates the equal protection clause. Upon reviewing the record and the applicable law, we affirm the judgment of the

appellate court and hold that the clear and convincing standard is retroactive and constitutional and that plaintiff has not proven filiation by clear and convincing evidence.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Alana Sudwisher, filed this action against the estate of Paul Hoffpauir on March 26, 1981, claiming to be the biological child of Paul Hoffpauir under newly enacted Civil Code Article 209 and thus entitled to a portion his estate. Hoffpauir died in 1979, survived by his wife Rosemary Wright Hoffpauir, to whom he had been married since 1933, and two legitimate children, Rosemary and Paul Jr.

Alana was born in Septmeber of 1951. Her biological mother, Joyce Moore, died in 1968. At the time of Alana's conception, Joyce was married to Davis Benoit who is listed as Alana's father on her birth certificate. Joyce and Benoit were divorced in June of 1951. Joyce had two other children, Brenda and John, during the time she was married to Benoit. Alana claims that her birth was the result of an adulterous and

secret affair between her mother and Hoffpauir and that as Hoffpauir's child, she is entitled to a portion of his estate. [Hand written dissents by Justice Lemmon and Chief Justice Calogero]

Lemmon, J., dissents and assigns reasons.

Calogero, J., dissents, agreeing with J. Lemmon's dissenting reasons while referring as well to language in *Succession of Bartie*, 472 So. 2d 578 (La. 1985).

At trial, Alana testified that in late 1969, she met with Hoffpauir at a motel in Rayne, Louisiana where Hoffpauir told Alana that he had had an ongoing relationship with Alana's mother for many years and that he was her father. She further testified that from 1969-1971 he would visit her, sometimes daily, and that about 15-20 times she went to his house when his wife and children were away. She then moved out of town and testified that she saw Hoffpauir only one other time, which was after he had suffered a stroke in 1971 and was bedridden. She testified that Hoffpauir's wife let her into

Hoffpauir's room to visit him. Hoffpauir died in 1979.

Two of Alana's aunts testified that in 1951 Hoffpauir visited Joyce several nights a week and gave her money for support. One aunt, Betty John, testified that Hoffpauir told her that Joyce was pregnant with his child and asked the aunt ot move in with Joyce and take care of her. She testified that Hoffpauir would visit Alana when she was a newborn baby, and that later when Alana's baby son died, Hoffpauir gave them money to pay for the funeral. The other aunt, Doris Pendracky, testified by deposition that Hoffpauir told her Alana was his child, gave her money to pay Joyce's hospital bill when Joyce had Alana, and visited Joyce at home four or five times after she had Alana. Joyce's neighbor, Marie Gaspard, also testified by deposition that Hoffpauir visited Joyce often for two or three years and when Joyce was pregnant with Alana, Hoffpauir told her the baby was his. Alana's brother-in-law, Lee Bertrand, testified that Alana introduced Hoffpauir a her father and that Hoffpauir verified

this b standing up. Alana also offered the deposition testimony of Hoffpauir's nurse, Doris Wiggins Adcock, who cared for him after his stoke who testified that when she asked him how may children he had, he said "two this side of the track and two on the other side."

Finally, Alana offered the results of a court-ordered DNA blood test between Alana, John, Brenda, and the legitimate child of Hoffpauir, Rosemary. John and Brenda were born during Joyce's marriage to Benoit and neither has instituted proceedings claiming to be the child of Hoffpauir. The experts testified that because Hoffpauir himself was not tested, the test could not show positively whether Alana was Hoffpauir's child. The results showed that out of eight genes tested, Alana and Rosemary matched on seven out of those eight genes which plaintiff's expert testified meant that Alana and Rosemary had a significant probability of being related. In fact, he testified in his deposition that the chances of them matching as they did and not being related was 1 in 24,000.

However, surprisingly, the results showed that Brenda also matched Rosemary seven out of eight times and John matched Rosemary six out of eight times. This showed that Brenda and John also had a significant probability of being related to Rosemary, although John less so than Brenda. However, the experts eliminated the possibility that ll of the people tested were fathered by Hoffpauir because the results found on gene 8 showed that John, Brenda and Alana could not all have the same father. Defendants' expert testified that based on the number of matches between the four people, there could be some relationship between the four people other than Rosemary and Alana sharing the same father.

The defendants presented evidence that Hoffpauir was a well-known and prosperous rice farmer and devoted father and husband with neither the time nor the inclination to become engaged in such an affair. Friends and relatives of Hoffpauir testified that he had never mentioned that he had an illegitimate daughter and that they never saw Hoffpauir and

Alana together. Hoffpauir's wife testified by deposition that she was never present when and if Alana ever came to visit Hoffpauir after he had his stroke, which directly contradicted Alana's testimony that Hoffapuir's wife let her into Hoffpauir's room. Hoffpauir's son, Paul Jr., testified that from approximately August, 1950 through August, 1951, Hoffpauir's father, suffering with cancer, was living with Hoffpauir and his family, and that Hoffpauir was at home every night to administer medicine to his father. This contradicts the testimony offered by Alana that in 1951, Hoffpauir was visiting Joyce several nights a week.

Based on the above evidence, the trial judge ruled in favor of the defendants finding that "although it may be possible that the events occurred as described by the plaintiff, and that it may even be probable, but it certainly was not clearly and convincingly established." The court of appeal affirmed, holding that the trial court correctly applied the clear and convincing standard of La.C.C. art. 209 retroactively and

that the trial court was not manifestly erroneous in finding that plaintiff failed to meet that standard. ***Sudwisher v. Estate of Hoffpauiri***, 96-1312 (La. App. 3d Cir. 3/5/97), 692 So. 2d 590. The court of appeal also found that the clear and convincing standard of La.C.C. art. 209 was not violative of the equal protection clause. ***Id.*** We granted a writ to consider the correctness of these rulings. ***Sudwisher v. Estate of Hoffpauir***, 97-C-0785 (La. 5/16/97), 693 So. 2d 786.

DISCUSSION

A. Retroactivity of Civil Code Article 209

Prior to 1980, illegitimate children[1] had very limited rights regarding the successions of their alleged parents. For

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[1]We note that in this case, Alana is presumed to be the legitimate child of Davis Benoit, who was her mother's husband at the time of her conception, pursuant to La.C.C. art. 184. However, in ***Griffin v. Succession of Branch***, 479 So. 2d 324 (La. 1985), we held that children presumed to be the legitimate children of one man under La. C.C. art. 184 were not precluded from filing an action under Article 209 seeking to prove filiation to another man, as the children were "technically illegitimate" as to that other man.

example, illegitimate children were prohibited from participating in the intestate succession of their father if the father was survived by legitimate descendants, ascendants, collateral relations, or a spouse, pursuant to article 919 of the Louisiana Civil Code. In 1980, this Court declared article 919 unconsititutional in that "[t]he distinciton drawn by art. 919 between these acknowledged illegitimates and all other relations of the decedent is arbitrary, capricious, and unreasonable." ***Succession of Brown***, 388 So. 2d 1151 (La. 1980).

More on point, Civil Code Article 1493 excluded illegitimate children from the right of forced heirship. As in ***Brown***, we held that article 1493 was unconsitiutional in that is denied illegitimates a right of forced heirship in the intestate succession of their parent while granting the same right to legitimate children." ***Succession of Clivens***, 426 So. 2d 585 (La. 1982). In 1981, Article 1493 was amended to give

illegitimates the same right of forced heirship as illegitimates.

Thus, prior to 1980, Alana had no forced heirship rights to Hoffpauir's estate, even if she could prove filiation, as the courts and the legislature gave little consideration to the rights of illegitimates. Since 1980, the code articles on filiation have been amended several time.[2] At the time

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[2]Prior to 1980, the filiation articles profided as followed:

Art. 208. Requirement to prove paternity or maternity.

> Illegitiamte children, who have not been acknowledged as provided in Article 203, may be allowed to prove their paternal descent.

Art. 209.

In the case where the proof of paternal descent is authorized by the preceding article, the proof may be made in either of the following ways:

1. By all kinds of private writings, in which the father may have acknowledged the bastard as his child, or may have called him so;

2. When the father , either in public or in provate, has acknowledged him as his child, or has called him so in conversation, or has caused him to be educated as such;

Alana's suit was filed, Article 209 had been rewritten by Acts 1980, No. 549 Section 1, effective July 23, 1980, to set up a procedure by which unacknowledged children could prove filiation entitling them to share in their father's succession by providing in pertinent part:

> Art. 209. Methods of proving filiation:
>
> 1. An illegitimate child may be entitled to a rebuttable presumption of filiation under the provisions of this article. Or any child may establish filiation, regardless of the circumstances of conception, by a civil proceeding instituted by the child or on his behalf by law, within the time limitation prescribed in this article.
>
> * * *
>
> 4. A child of a man may prove filiation by any means which establish, by a preponderance of the evidence, including ecknowledgment in a testament, that he is the child of that man. Evidence that the mother and alleged father were known as living in a state of concuginage and resided as such at the time when the child

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3. When the mother of the child was known as living in a state of concubinage with the father, and resided as such in his house at the time when the child was conceived.

was conceived creates a rebuttable presumption of filiation between the child and the alleged father.

In 1981, Article 209 was again amended by Acts 1981, No. 720, Section 1 to provide in pertinent part:

Art. 209. Proof of filiation.

A. A child not entitled to legitimate filiation nor filiated by the initiative of the parent of legitimation or by acknowledgment under Article 203 must prove filiation by a preponderance of the evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this Article.

In 1982, Article 209 was again amended by Acts 1982, No. 527, Section 1 in pertinent part as follows:

Art. 209. Proof of filiation.
A. A child not entitled to legitimate filiation nor filiated by the initiative of the parent of legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged living by a preponderance of the evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this article.

B. A child not entitled to legitimate filiation nor filiated by the initiative of the parent of

> legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged deceased parent by clear and convincing evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this article.

Plaintiff argues that the trial court and court of appeal were in error in applying the 1982 amendment to Civil Code Article 209, increasing the burden of proof to clear and convincing evidence as to a deceased parent, because the retroactive application took from plaintiff her substantive existing right to prove her case by a preponderance of the evidence.

Article 6 of the Louisiana Civil Code directs as follows:

> In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretative laws apply both prospectively and retroactivley, unless there is a legislative expression to the contrary.

Although La. R.S. 1:2, which provides that "[n]o section of the Revised Statutes is retroactive unless it is expressly

stated," appears to conflict with C.C. art. 6, La. R.S. 1:2 has been limited to apply only to substantive and not procedural or interpretive legislation. ***Manuel v. Louisiana Sheriff's Risk Management Fund***, 95-0406 (La. 11/27/95), 664 So. 2d. 81, 86; ***St. Paul Fire & Marine Insurance Company v. Smith***, 609 So. 2d 809, 816 (La. 1992); ***Lott v. Haley***, 370 So. 2d 521 (La. 1979).

Accordingly, in determining whether the clear and convincing standard of C.C. art. 209 is to be applied retroactively, we must engage in a two part inquiry. The first step involves determining whether the Legislature expressed an intent concerning the retroactive or prospective application of the law. If the Legislature expressed such an intent, the process is at an end and the law must be characterized as the Legislature intended. However, if no intent is expressed by the Legislature, we must discern the Legislature's intent and classify the law as either substantive, procedural or

interpretative. ***Manuel***, *supra*; ***Rousselle v. Palquemines Parish School Board,*** 93-1916 (La. 2/28/94), 633 So. 2d 1235, 1244; ***St. Paul Fire & Marine,*** *supra*; ***Segura v. Frank,*** 93-C-1271 (La. 1/14/94), 630 So. 2d 714; ***Cole v. Celotex Corp.***, 599 So. 2d 1058 (La. 1992).

The Legislature did not express an intent concerning the retroactive or prospective application of C.C. art. 209. Thus we must classify the law requiring clear and convincing evidence to meet the burden of proof as to deceased parents as either substantive, procedural or interpretive. "Substantive laws are laws that impose new duties, obligations or responsibilities upon parties, or laws that 'establish new rules, rights and duties or change existing ones.'" ***Manuel,*** *supra* at 86 (citing ***St. Paul Fire & Marine,*** *supra* at 817). "Interpretative laws are those which clarify the meaning of a statute and are deemed to relate back to the time that the law was originally enacted." ***Id.*** "Procedural laws prescribe a

method for enforcing a substantive right and relate to the form of the proceeding or the operation of the laws." ***Rousselle,*** *supra* at 1244; ***Segura v. Frank,*** *supra.*

This Court has held that a statute changing the burden of proof is procedural and is to be applied retroactively. ***Ardoin v. Hartford Acc. & Indem. Co.,*** 360 So. 2d 1331 (La. 1978). In ***Ardoin***, the burden of proof previously established by case law in medical malpractive cases as to all doctors was the "locality rule." At the time of the trial, La. R.S. 9:2794, enacted in 1975 established the burden of proof as to specialists as "the degree of care ordinarily practiced by physicians or dentists withing the involved medical specialty." This Court held that "[t]o the extent that the statute establishes a burden of proof in malpractice actions, it clearly should be characterized as procedural and therefore applied to pre-existing facts and relations."[3] 360 So. 2d at 1339; *see*

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[3]***Ardoin*** also held that to the extent the statute described a standard of conduct, it was interpretive.

also ***Lavespere v. Niagara Mach. & Tool Works, Inc.***, 910 F. 2d 167, 182 (5th Cir. 1990) ("[i]t is well settled in Louisiana that laws affecting burden of proof are 'procedural' as that term I used in Civil Code article 6.")

Likewise, the change in the burden of proof from preponderance of the evidence to clear and convincing falls under the definition of a procedural law in that it prescribes a method for enforcing a substantive right. The substantive right is the right of an illegitimate to prove filiation to a parent, living or deceased.[4] The method of enforcing that substantive right, by proving filiation to a deceased parent by clear and convincing evidence, is procedural.

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[4]As set forth before the 1981 amendment, Article 208 provided that "[i]llegitimate children, who have not been acknowledged as provided in Article 203, amy be allowed to prove their filiation." AS amended in 1981, Article 208 now reads: "In order to establish filiation, a child who does not enjoy legitimate filiation or who has not been filiated by the initiative of the parent by legitimation or b acknowledgment under Article 203 must institute a proceeding under Article 209."

However, procedural laws are not accorded retroactive effect where such retroactivity would operate unconstitutionally to disturb vested rights. ***Lott v. Haley,*** *supra* at 523. In ***Lott v. Haley,*** we held that where the retroactive applications of a newly enacted statute of limitations would operate to eliminate plaintiff's vested right to sue on his pre-existing cause of action without providing a reasonable period following its enactment to assert his claim, such statute could not be applied retroactively. ***Id.*** To the extent that plaintiff aruges that she had a vested right to prove her case by a preponderance of the evidence at the time the suit was filed, we disagree. The retroactive application of a higher burden of proof does not eliminate plaintiff's vested right to prove filiation, it merely imposed a different, though reasonable, burden of proof. In addition, this Court has held that a party "has no vested or absolute right in procedural matters." ***State v. Clark,*** 340 So. 2d 208, 220 (La. 1976) (the

elimination of a right to a directed verdict of acquittal to a defendant who either elects to be tried by jury or who is compelled to be tried by jury because he is charged with a capital offese does not constitute a denial of equal protection or due process rights).

On three occasions, this Court has commented on whether the clear and convincing standard of Article 209 is to be applied retroactively, albeit in dicta. In the case at bar, this Court reversed the trial court's denial of Alana's motion to compel the DNA testing of Rosemary's blood. ***Alana Sudwisher v. Estate of Paul Hoffpauir***, 589 So. 2d 474 (La. 1991) (on rehearing). In that opinion, we stated that "Alana's statutory burden of proof is 'clear and convincing evidence.'" ***Id.*** That Alana had the heightened burden of clear and convincing evidence rather than a preponderance of the evidence was a factor in deciding to allow the DNA testing.

In ***Chatelain v. State, DOTD,*** 586 So. 2d 1373, 1382,

n. 10 (la. 1991), we stated in a footnote that the clear and convincing standard of Article 209 "has been held to be procedural and therefore applicable to cases that are tried after the amendment." ***Chatelain*** presented an unusual fact situation in that the mother of the decedent brought a wrongful death and survival action wherein her right to recover was dependant on the decedent having no surviving spouse or children The defendants, the driver of the car involved in the accident, his insurer and the DOTD, alleged that the mother could not recover because the decedent was survived by a daughter who was legitimated by the decedent under Article 198. Legitimation under Article 198 requires marriage subsequent to the child's birth and formal or informal acknowledgment of the child by the parent but does not specify the burden of proof for legitimation. This Court adopted the clear and convincing standard of Article 209 as the standard for legitimation under 198 when the alleged

parent is deceased. 586 So. 2d at 1380.

Plaintiff argues that we hinted that a change in the burden of proof of Article 209 may be substantive in ***Succession of Bartie,*** 472 So. 2d 578 (La. 1985). In that case, three alleged illegitimate children sought to enforce their forced heirship rights by establishing filiation under Article 209. The suit was filed in 1980, when the burden of proof was the preponderance of the evidence standard, but the trial was not held until 1984, when the burden had been changed to clear and convincing. The trial court held that the plaintiffs had met their burden of proof by a preponderance of the evidence. The defendants sought a new trial, arguing that the trial court should have applied the clear and convincing standard. In response, the plaintiffs agreed that the proper standard was clear and convincing standard. The trial court denied the motion for new trial. This Court affirmed, finding it was of not consequence what standard applied because the

plaintiffs had met the clear and convincing standard. 472 So. 2d at 582. However, we commented as follows:

> Defendants content that the trial judge was wrong in this regard and that "clear and convincing" is the appropriate standard of proof. Plaintiffs, perhaps too generously, concede as much, but contend that the evidence supports the finding that they have proven their filiation to Henry Barite by "clear and convincing" evidence. It is not at all certain, however, that "clear and convincing" is the approperiate standard to apply in this case. Arguably, at least, the amendment to La. C.C. art. 209 in 1982, after plaintiffs filed this lawsuit, increasing plaintiffs' burden of proof of filiation , is substantive in its effect upon plaintiffs, rather than proceudral, and as such, should not be applied retroactively. *See* ***Pounds v. Schori,*** 377 So. 2d 1195 (La. 1979); Spaht, Persons, Developments in the Law, 1980-1981, 42 La.L.Rev. 404, 409-410. Nevertheless, we need not resolve that legal issue here, for on the record before us we determine that plaintiffs have established their filiation to Henry Bartie by clear and convincing evidence.

Id.

Not only is this comment expressly dicta, but the case on which it is based is distinguishable. In ***Pounds v. Schori,***

this Court refused to retroactively apply Act 430 of 1976, which made significant changes to the law affecting disvowal of persons born during legal marriage, and instead applied the law in effect at the time of disavowal suit was filed.[5] The pre-existing law required that the father file his disavowal suit within 6 months of th birth of the child, which we held to be a preemptive period which could not be interrupted or suspended. Because the father did not timely file this suit under the pre-existing law, his disavowal action was dismissed. 377 So. 2d at 1198. In refusing to apply the new disavowal law retroactively, we reasoned that "[t]he status of an individual born during marriage, and entitled to the presumption of legitimacy, is a matter of substance of the utmost import considering it involves not only legitimacy but

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[5]Civil Code Article 189, enacted by Acts 1976, No. 430, Section 1, also requires that a father file his disaviwal suit within six months of the birth of the child, or knowledge of the birth, but allows that the time for filing suit may be suspended if the father is unable for reasons beyond his control to file the suit timely.

the right of inheritance." ***Id.*** In holding that the period created by Art. 191 was peremptive, we stressed our "traditional and historical positions of zealously guarding and enforcing the presumption of legitimacy." ***Id.*** at 1200. Thus, in effect we found the child's presumption of legitimacy and right to be free form a disavowal action after six months from her birth to be an important substantive right.[6] This is not comparable to a change in a burden of proof wherein an illegitimate child is not losing her right to prove filiation to a deceased parent, which is indeed a substantive right, but merely is held to a different standard of proof.

For the reasons previously stated, we now hold that the 1982 amendment to Article 209 changing the burden of

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[6]This case is logically consistent with our holding in ***Chance v. American Honda Motor Co., Inc.***, 93-2582 (La. 4/11/94), 635 So. 2d 177, 178, wherein we held that once an action has prescribed, the right to plead preseciption is a substantive right which cannot be stripped away by the retroactive applicaion of a new presecirptive period which would result in the revival of the prescribed cause of action.

proof of filiation to a deceased parent to clear and convincing evidence id procedural and applies retroactively to his filiation action. Thus, we turn to the claim that the lower courts were manifestly erroneous in holding that plaintiff failed to meet that burden.

The Comments to Article 209 indicate that "[p]roof of filiation may include, but is not limited to: "Informal" acknowledgment; scientific test results; acknowledgment in a testament; and proof that the alleged parents lived in a state of concubinage at the time of conception." In this case, the proof includes evidence of "informal acknowledgment" and DAN test results. We have discussed the type of evidence that courts have considered in discussing informal acknowledmgnet as follows:

> In discussing informal acknowledgment, appellate decision have generally referred to the standards set forth in the oringial Article 209 for proving paternity, such as the alleged father's acknowledgment of the child in formal writings or in public or private conversations, causing the education of the child as his own,

> and living in concubinage with the mother in his home at the time of the child's conception. Other conduct which has been considered to constitute informal acknowledgment by the alleged father includes rearing the child in his home, naming the child in his will, giving the child his surname, and holding the child out in the community as his own. Keene, Irregualr Successions in Louisiana, 7 Loy.L.Rev. 94, 102-3 (1954), and cases cited therein. Moreover, courts have been reluctant to recognize an informal acknowledgment for purposes of filiation unless the father has recognized the child as his own unequivocally and on several occasions. **Succession of Vance,** 110 La. 760, 34 So. 767 (1903) (one statement by the alleged father that the doctors were wrong in predicting his children be afflicted because Eliza James was "as healthy as anybody" did not "suffice to invest [James] with the title of a legally acknowledged. . . child"); ***Succession of Corsey,*** 171 La. 663, 131 So. 841 (1930) (statements by the alleged father acknowledging Ethel Casson as his child at various times to various parties constituted acknowledgment); ***Succession of Matte***, 346 So. 2d 1345 (La. App. 3rd Cir. 1977) (an informal acknowledgment of filiation must be unequivocal and sufficiently frequent so that there is littlo doubt the alleged father truly believed he was the father of the child).

Chatelain v. State, DOTS, *supra* at 1379. We agree that, in

the absence of other evidence, acts by the father recognizing the child as his own must be unequivocal and frequent to constitute an informal acknowledgmetn. This is particularly so when the illegitimate must prove filiation by clear and convincing evidence such that the actions by the alleged father must be of such frequency that the trier of fact is convinced that paternity is "highly proable, i.e. much more probable than its non-existence." ***Id.*** In this case, we agreed with the lower courts that the plaintiff failed to present evidence of actions by Hoffpauir which were unequivocal and of sufficient frequency to constitute an informal acknowledgment under the clear and convincing standard of proof.

However, plaintiff presented other evidence, i.e. DNA test results. Here, the trial judge described the expert testimony surrounding the DNA test results in this case as "ambiguous at best" and we agree. While the tests do show a high probability that Alana and Rosemary are related in some

way, they also show a high probability that john and Brenda are also related to Rosemary. Considerng that both parties' experts agreed taht the testing showed that all four could not have shared the same father, and considering that all four did not share the same mother, it is difficult to ascribe much weight to the test resluts but to say that all four are in some way related. However, the DNA tests do not clearly and convincingly prove, along with all the other evidence, that Hoffpauir was Alana's father.

B. Constitutionality of Civil Code Article 209

Plaintiff's last assignment of error is that by the amendment to Civil Code Article 209, the legislature created two classes of illegitimates, giving one class a higher burden of proof than the other, depriving that class of illegitimates of consitutional rights under the equal protection clause. Plaintiff argues that given the availability of scientific DNA technology, there is not rational reason for discriminating among the classes of illegitimates.

The equal protection clause of the Fourteenth Amendment of the United States Consitution and Article 1, Section 3 of the Louisiana Consitutition provide that no person shall be denied equal protection of the laws. Although classification based on illegitimacy are not "suspect" or subject to "strict scrutiny" under equal protection analysis, the scrutiny applied to them "is not a toothless one. . ." ***Succession of Grice***, 462 So. 2d 131, 133 (La. 1985); ***Trimble v. Gordon***, 430 U.S. 762, 97 S. Ct. 1459, 52 L.Ed.2d 31(1977); ***Matthews v. Lucas***, 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976). Such classifications are unconstitutional unless they are substantially related to permissible state interest. ***Succession of Grice,*** *supra;* ***Pickett v. Brown,*** 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 503 (1978). Thus we must determine whether the requirement that an illegitimate child prove filiation to a deceased parent by clear and convincing evidence is

substantially related to permissible state interests.

Based on United States Supreme Court precedent, this Court has already concluded taht "(1) the state has a substantial, permissible interest in providing for the just and orderly disposition of property at death where intestate paternal inheritance of illegitimate children is concerned, an area involving unique and difficult problems of proof, and (2) the means adopted by the state to further that interest may result in some inequity and still be constitutional, provided it is substantially related to that interest." ***Succession of Grice***, *supra* at 134. We further concluded that the "substantial relation requirement will not be met if the statute inevitably and unnecessarily excludes some significant categories of illegitimate children." ***Id.***

Thus, the only unresolved questions is whether the means adopted by the state, i.e. the imposition of the clear and convincing standard as to deceased parents, is substantially

related to the permissible state interest in providing for the just and orderly disposition of property at death. In ***Chatelain***, this Court discussed the imposition of the higher standard of proof where the alleged parent is deceased as follows:

> The requirement of proof by a clear and convincing evidence has traditionally been appplied in cases in which there is a special danger of deception or in which the particular type of claim is disfavored on policy grounds. McCormick on Evidence, Sec. 340(B) (3d ed. 1984); ***Succession of Lyons,*** 452 So. 2d 1161 (La. 1984).
>
> It is logical that a higher standard of proof should be required for both filiation and legitimation when the alledged parent is dead. Claims by an illegitimate child to the property of an alleged parent or to the status of a wrongful death beneficiary of the alleged parent, when not presented unitl after the death of the alleged parent, are replete with danger of fraud. AS sated in Spaht, Developments in the Law, 1981-1982 -- Persons, 43 La.L.Rev. 535, 537 (1982), in regard to proof of filiation, "[a]fter the death of the alleged parent, whose knowledge concerning the fact or probability of his filiation to the child is superior, the vulnerability to fraudulent claims, is

significanlty increased."

Chatelain, supra at 1378. Thus, we recogniae that a higher standard of proof where the alleged parent is deceased is substantially related to the state's interest in the ordely disposition of property at death because of the danger of fraud and the inability of the opponents to present evidence which might be available to the alleged parent if he were alive. Merely because illegitimate children trying to prove filiation to a deceased parent will have to meet a higher standard than those trying to prove filiation to a living parent does not mean that the statute is unconstitutional. Illegitimates are not excluded form proving filiation, they just have a higher, but hardly insurmountable, burden of proof.

Plaintiff argues that there is no longer any basis for the heightened burden of proof because with the advent of DNA testing, filiation to a living parent is much easier to prove than filiation to a deceased parent whose blood may not be

available for DNA testing. However, the availability of DNA testing of a living parent does not mean that the requirement of a heightened burden of proof for deceased parents is not substantially related to the state's intersts. As this case illustrates, complete DNA testing of all involved, especially the father, may not be available or the results may be ambiguous, thus leaving the case to be decided by the other evidence which is more susceptible of fraud and harder to rebut when the alleged father is deceased.

CONCLUSION

The burden of proof imposed by Article 209, which requires that illegitimates prove filiation to a deceased parent by clear and convincing evidence, is procedural and retroactively applies to this action. We find that the trial court did not commit manifest error in finding that the plaintiff failed to meet this burden. In addition, the imposition of this burden of proof is constitutional

DECREE

For the reasons stated herein, the court of appeal's judgment is affirmed.

AFFIRMED.

APPENDIX D

MAR 05 1997

NO. 96-1312

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

ALANA SUDWISHER

Plaintiff - Appellant

VERSUS

ESTATE OF PAUL HOFFPAUIR, ET AL

Defendant - Appellees

On appeal from the Fifteenth Judicial District Court, Parish of Acadia, Honorable Jules Edwards, Judge, Presiding.

Before: YELVERTON, THIBODEAUX, and SAUNDERS, Judges.

YELVERTON, Judge.

The issue in this appeal is the correctness of the trial court's finding that Alana Sudwisher (Alana) was not the biological child of the deceased, Paul Hoffpauir. We conclude that the trial judge, who properly applied the clear and

convincing burden of proof, did not commit manifest error in his findings. Accordingly, we affirm.

Saunders J dissents The amendment to article 209 is substantive. The P. has shown, by a preponderance of the evidence her case. Should not be held to a higher standard.

FACTS

The filiation action has been pending since 19881. Alana sued Hoffpauir's estate claiming that Hoffpauir was her biological father. He died in 1979 survived by his wife, Rosemary Wright Hoffpauir, whom he had married in 1933. Hoffpauir was also survived by his two legitimate children resulting from his marriage of 46 years: Rosemary Hoffpauir and Paul Hoffpauir, Jr. (Note: Paul Jr. was legally adopted by the couple). Alana was born September 1951 and her biological mother was Joyce Moore (Joyce), who subsequently died in 1968. In her petition, Alana claimed that, as the biological child of Hoffpauir, she is a forced heir and, thus, entitled to share in Hoffpauir's estate.

Although Alana's mother was married to Davis Benoit when Alana was conceived and although Benoit is listed as Alana's father on her birth certificate, Alana nevertheless claimed that Benoit could not be her biological father as he was incarcerated during 1950 and 1951. Instead, her birth in 1951 resulted from an adulterous and secret affair between Joyce and Hoffpauir. Alana further alleged that Hoffpauir visited with her on many occasions and that in 1969 he admitted to her that she was his biological daughter.

To aid in proving the relationship, Alana sought to compel Hoffpauir's legitimate daughter, Rosemary Hoffpauir, to submit to a blood test since testing of Hoffpauir's necrotic tissue was not feasible. After the trial court denied Alana's request for a compelled blood test of Rosemary, the Louisiana Supreme Court granted a writ and held that Rosemary could be compelled to submit blood for DNA comparison with Alana. *See Sudwisher v. Estate of Paul Hoffpauir*, 589 So.2d 474 (La. 1991), *cert. denied*, 504 U.S. 909, 112 S.Ct. 1937

(1992). Thereafter, Dr. James Cohen, Ph.D. conducted the blood testing. He took blood samples from Rosemary and Alana, as well as two of Alana's siblings, John Benoit and Brenda Lecompte. (Alana and her two siblings, Brenda Lecompte and John Benoit, definitely shared the same biological mother, Joyce. However, it was assumed that they did not share the same biological father; Davis Benoit was always considered the natural father of Brenda and John, but not of Alana even though he was listed as such on Alana's birth certificate.) Neither of Alana's two siblings made any claims that Hoffpauir was their biological father. Their blood was tested solely to determine which genes in Alana were contributed by their common mother and to verify the assumption that Alana did not share the same father with Brenda and John.

In early 1996, fifteen years after Alana filed suit, proceedings to decide filiation finally commenced. Dr. Cohen testified as to the results of DNA blood testing that essentially

compared eight different genes of each of the four persons tested. He explained that the test could not answer the central questions, which was whether Alana was the biological daughter of Hoffpauir. The test could indicate only if Alana and Rosemary were related. If a relationship was indicated, no one could answer exactly ***how*** the parties were related. In other words, even if Alana and Rosemary were somehow related, it would be impossible to conclude that it was due to Hoffpauir as the common father. It was even impossible to scientifically verify that Rosemary, Hoffpauir's legitimate daughter, was actually his biological daughter since his blood was never tested.

Based on his "DNA Polymorphism Summary Report," Dr. Cohen concluded that there was "really a phenomenal amount of matching" between the genes of Alana and Rosemary. Thus, he opined that the test results suggested some type of relationship between Alana and Rosemary. On cross-examination, Dr. Cohen admitted to a surprising result.

While the tests indicated a high probability of a relationship between Alana and Rosemary, the results also indicated a high probability of relationship between Rosemary and Alana's two siblings, Brenda and John. However, neither of these two siblings contended that Hoffpauir was their natural father.

Dr. Herbert Polesky, the expert for the defense, testified as to his interpretation of the test results. He agreed with Dr. Cohen that all four persons tested "share a high probability of having the same genetic background." Dr. Polesky opined that this genetic matching between Rosemary, Alana and Alana's siblings might be explained by some relationship among all four *other than* Rosemary and Alana sharing a common father. Furthermore, he stated that it is difficult to "interpret this data if there isn't some other relationship," besides the common father theory, between Alana and Rosemary.

In addition to the expert testimony, both parties called numerous witnesses to testify as to Hoffpauir's activities in

the early 1950's when he was alleged to have fathered Alana. The testimony was conflicting. Two of Alana's aunts, one in court and one by deposition, testified that Hoffpauir essentially lived a double life, visiting Joyce several nights a week for many hours each visit and giving sums of money for support. A friend of Alana's family, by deposition, corroborated the aunts' account of the relationship between Hoffpauir and Joyce.

In contradiction, defense witnesses testified that Hoffpauir, devoted to his family and his work, was rarely absent from the family home in the evenings and usually had supper with his family. Paul Hoffpauir, Jr., who was 10 years old in 1951, specifically remembered that his dying grandfather lived with the family from late 1950 until his death in late 1951, with hired nurses caring for him during the day. Alana was conceived in early 1951. He testified that Hoffpauir had to be home in the evenings as he was the grandfather's primary caretaker and the sole person in the

household capable of administering injections at night.

A close friend of the Hoffpauir family, who regularly visited with the Hoffpauirs during the 1950's, testified that it would have been impossible for Hoffpauir, a dedicated rice farmer, to have lived a double life during that period. She related the following:

> This man (Hoffpauir) was very ritualistic about his schedule, literally. He was up in the morning at 4:30, came back into town from his farm work early for lunch, worked again, and then was home for supper. You could set your clock by it. It would have been very odd for that not to occur. And to be in bed by 9:00. I didn't usually call Rosemary after 9:00, for the reason that I would not have wanted to disturb them.

Several other witnesses corroborated this testimony concerning Hoffpauir's work schedule and his hardworking, no-nonsense attitude toward his farming, leaving little time for a secret life.

Significantly, the defense presented evidence conflicting with Alana's allegation in her petition that Benoit

could not have fathered her because he was incarcerated in 1950 and 1951. Court documents (introduced in evidence at the trial on the merits, after the Supreme Court granted the writ) prove that Benoit was incarcerated as late as February of 1951, only seven months before Alana's birth. Thus, Alana's allegation that Benoit fathering her was physically impossible was effectively discredited.

Alana testified concerning her relationship with Hoffpauir. She stated that, sometime in 1969, she met with Hoffpauir who informed her that he and Joyce had been lovers and that he was her natural father. There were no witnesses to this alleged meeting; nor can Alana remember the exact date or exact location of this meeting except that if occurred at a motel in Rayne, Louisiana. Alana further testified that, after this meeting, she and Hoffpauir met regularly during a two-year period. During this period, they net 15 or 20 times at Hoffpauir's family home in the evenings, or they met at Alana's home almost every morning before Hoffpauir went to

his doctor's office. Alana testified that she last saw Hoffpauir at his family home after he had his stroke and had become bedridden. On that final visit which occurred sometime in the 1970's, Alana claimed that Hoffpauir's wife actually let Alana in to visit her bedridden husband. Several of Alana's relatives testified to isolated instances of seeing Hoffpauir and Alana together and of Alana introducing Hoffpauir to them as her father.

However, members of the Hoffpauir family contradicted portions of Alana's testimony. Mrs. Hoffpauir flatly denied ever meeting Alana or permitting Alana to visit with her sick husband in their family home. Hoffpauir's daughter, Rosemary, stated that during the two-year period when Alana allegedly visited the Hoffpauir family home 15 to 20 times, she was attending high school and living with her parents, and she denied these visits. Rosemary testified that she and her mother were rarely absent from the family home in the evenings. Thus, it would have virtually impossible for

Alana to have visited numerous times without detection. Rosemary testified that she never saw Alana at the family home and she did not know of any relationship between Hoffpauir and Alana.

Alana also testified that Hoffpauir often brought her meat and gave her cash. She stated that before his illness he had given her two pictures of himself. Alana introduced two pictures at trial. However, these pictures contained no inscription from Hoffpauir's hand, and Alana had no pictures of the two of them together. Nor did she have any mementos or writings from Hoffpauir. Contradicting Alana's story, Rosemary Hoffpauir testified that one of the photos introduced by Alana was stolen from the family album after her father's illness and disability. This photo had marks on the back indicating that it was removed from an album.

The trial judge rendered judgment on June 6, 1996, in favor of the Hoffpauir estate and dismissed Alana's lawsuit. In his written reasons for ruling, the trial judge reviewed the

conflicting testimony and concluded as follows:

> The court is not convinced that Paul C. Hoffpauir, Sr. continually or habitually acknowledged Alana Sudwisher as his daughter. Furthermore, this petitioner failed to provide evidence that Hoffpauir was generally reputed to be her father.
>
> After reviewing the evidence in this case, the court finds that although it may be possible that the events occurred as described by the plaintiff, and that it may even be probable, but it certainly was not clearly and convincingly established. Paul C. Hoffpauir, Sr. did not continuously and unequivocally recognize this plaintiff as his own child. Hoffpauir may have led a double life, withholding any knowledge of this illicit relationship and its fruit from all but the closest friends and relations of the plaintiff, but the Court is not firmly convinced of the truth of this assertion.

As to the genetic testing and the expert interpretations, the judge characterized this evidence as "ambiguous at best."

On appeal, Alana argues that the trial judge committed legal error by applying the clear and convincing standard of proof to her case; instead of the lese stringent standard, preponderance of evidence, should have applied.

Additionally, she argues that, even if the more stringent burden of proof applied, the trial judge committed manifest error in his finding that Hoffpauir was no Alana's natural father.

OPINION

Since 1981, when Alana filed her filiation suit, the code article controlling filiation has undergone several revisions. The controlling article, La.Civ.Code art. 209, currently states, in part, as follows:

> B. A child not entitled to legitimate filiation nor filiated by the initiative of the parent of legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged deceased parent by clear and convincing evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this article.
>
> C. The proceeding required by this article must be brought within one year of the death of the alleged parent or withing nineteen years of the child's birth, whichever first occurs. (Emphasis provided)

When Alana filed suit in March of 1981, Article

209(5) as it then read, before the 1982 revisions, provided for the following time limitation: "A civil proceeding to establish filiation must be brought within six months after the death of the alleged parent, or within nineteen years of the illegitimate child's birth, whichever occurs first." Although Alana technically failed to meet this time limitation (she was older than 19 years), she nevertheless filed timely due to the one-year grace period provided by then Section 4 of Act No. 549 of 1980.

The Article 209(B) requirement of proof by "clear and convincing evidence" as to a deceased parent was added in 1982, *after* Hoffpauir had died and Alana had filed suit. Prior to this 1982 amendment, Article 209 only required proof by "a preponderance of the evidence' for both a living and a deceased parent. In determining the applicable burden of proof in this case, we must answer two questions. First, does the "clear and convincing" burden of proof have retroactive effect such that it applies to Alana's suit? Second, if so, does

this heightened burden of proof violate the constitutional, equal protection rights of illegitimates seeking filiation with a deceased parent? For the reasons below, we hold that the applicable standard in the case is clear and convincing evidence.

The issue of retroactivity is settled. In *Thomas v. Smith*, 463 So. 2d 971, 975 (La.App. 3 Cir. 1985), this court held that the 1982 amendment to Article 209, providing for the "clear and convincing" standard of proof, would be applied retroactively as "it is evidentiary and remedial in nature." *See also Succession of Sanders*, 485 So. 2d 126 (La.App. 2 Cir.) *writ denied*, 487 So. 2d 443 (La. 1986), where the second circuit held that the 1982 amendment was retroactive. True, the Louisiana Supreme Court has not directly decided the issue. However, in the present case of *Sudwisher*, 589 So. 2d at 475, when it was before us on writs, the supreme court stated in dictum: "Alana's statutory burden of proof is 'clear and convincing evidence.' This standard of

proof is more stringent than the preponderance standard which generally applies in civil cases." We hold that the 1982 amendment to Article 209 applies retroactively, and, hence, Alana's burden is "clear and convincing evidence."

Alana argues that, if the more stringent burden of proof does apply, this statutory provision is violative of the equal protection clause and, thus, unconstitutional. She argues that Article 209 impermissibly creates two different classes of illegitimate children seeking filiation: one class of illegitimates, who filled filiation suits against a living parent and are held in the less stringent standard of preponderance of evidence, and another class of illegitimates, who seek filiation with a deceased parent and are held to the more stringent standard of clear and convincing evidence. Alana is a member of this latter class, and it is this class, Alana argues, whose equal protection rights are violated.

In *Succession of Grice*, 462 So. 2d 131 (La. 1985), appeal dismissed 473 U.S. 901, 105 S. Ct. 3517 (1985), the

supreme court addressed whether the time limitation imposed by Article 209(C) was constitutional and held that the limitation did not violate the illegitimate child's equal protection rights. Although the *Grice* court did not address specifically the constitutionality of the heightened burden of proof required by paragraph (B) of Article 209, it set forth the equal protection analysis for any claim based on illegitimacy:

> The equal protection clause of the fourteenth amendment of the federal constitution and article 1 section 3 of our state constitution provide that no person shall be denied equal protection of the laws. Although classifications based on illegitimacy are not "suspect" or subject to "strict scrutiny" under equal protection analysis, the scrutiny applied to them "is not a toothless one. . ." Such classifications are unconstitutional unless they are substantially related to permissible state interests. (Citations omitted)

Grice, 462 So. 2d at 133.

It has long been recognized that the states have a legitimate, permissible interest in safeguarding the just and orderly disposition of succession property as well as avoiding

spurious paternity suits and fraudulent claims against estates. *Id.; Lalli v. Lalli,* 439 U.S. 259, 99 S. Ct. 518 (1978); *Sanders,* 485 So. 2d 126. In *Lalli*, the United States Supreme Court decided the constitutionality of a New York statute that allowed an illegitimate child to inherit from the natural father, who died intestate, *only if* the father's paternity had previously been declared in a judicial proceeding *before* that father's death. The *Lalli* court held that this "evidentiary" requirement, i.e., a judicial declaration of filiation before the father's death, was "substantially related" to "important state interests," i.e., the orderly disposition of succession property and the avoidance of fraudulent claims. *Id.* This, the court concluded that the statute was not violative of equal protection rights. Before reaching its conclusion, the *Lalli* court discussed in detail the inherent evidentiary problems associated with filiation to the deceased putative father:

> As the State's interests are substantial, we now consider the means adopted by New York to further those interests.

. . .

> Accuracy is enhanced by placing paternity disputes in a judicial forum during the lifetime of the father. As the New York Court of Appeals observed in its first opinion in this case, the "availability [of the putative father] should be a substantial factor contributing to the reliability of the fact finding process." *In re Lalli*, 38 N.Y.2d, at 82, 378 N.Y.S.2d, at 355, 340 N.E.2d, at 724. In addition, requiring that the order be issued during the father's lifetime permits a man to defend his reputation against "unjust accusations in paternity claims," . . .
>
> . . . [F]raudulent assertions of paternity will be much less likely to succeed, or even arise, where the proof is put before a court of law at a time when the putative father is available to repond, rather than first brought to light when the distribution of the assets of an estate is in the offing.

Id. at 271-272.

Like the requirements of the New York statute at issue in *Lalli,* the burden of proof provided by Article 209(B) is an evidentiary requirement and specifically addresses the problem of the deceased putative father and spurious claims. The legislature obviously enacted this heightened burden of

proof because the deceased putative father would not be available to defend himself to to provide valuable evidence. If the New York statute had been applicable to Alana's claim, she would have been precluded from even filing suit against Hoffpauir's estate since that statute required judicial proceedings *before* the father's death. Yet, the New York statute was held to be constitutional. Our Article 209(B), with a far less demanding burden of proof than the New York statute, should likewise be hold consitituionally valid. We conslude that the "clear and convincing" burden of proof required by Article 209(B) is substantially related to the legitimate state interests of ensuring the orderly disposition of succession property and avoiding fraudulent claims. Thus, the statute is not violative of the equal proteciton clause.

Having decided that the burden of proof is clear and convincing evidence, we now address the remaining issue which is whether the trial judge correctly concluded that Alana failed to prove filiation. The trial judge's factual

findings regarding Alana's filiation with Hoffpauir are subject to the manifest error standard of review. *D.M.J. v. B.G.B.*, 579 So. 2d 537 (La. App. 4 Cir. 1990), *writ denied*, 578 So. 2d 932 (La. 1991), *cert. denied*, 502 U.S. 888, 112 S. Ct. 248 (1991). This deferential standard requires that, when the parties have presented conflicting testimony, the appellate court should not disturb the fact finder's conclusions based on credibility evaulations. *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989).

Based on the record, we cannot say that the trail judge committed manifest error. The expert evidence is inconclusive on the issue of Alana's paternity. We agree with the trial judge that the expert testimony is "ambiguous." Furthermore, the record is replete with the conflicting testimony regarding the two disputed events, Hoffpauir's affari with Joyce during the early 1950's when Alana was conceived, and Alana's relatsionship with Hoffpauir in the late 1960's and early 1970's. It was crucial to her case that Alana

prove the existence of these two events. However, in the factual section, we have already detailed the substance of the contradictory testimony and the inconclusive evidence. We are unable to conclude that the trial judge's factual findings are unreasonable in light of the conflicting testimony.

Because we affirm on the merits it is unnecessary that we address the prescription issue raised by appellees in their protective answer to the appeal.

The judgment is affirmed at appellant's cost.

AFFIRMED.

APPENDIX E

ALANA SUDWISHER	15TH JUDICIAL DISTRICT COURT
VERSUS NO. 47796	PARISH OF ACADIA
ESTATE OF PAUL C. HOFFPAUIR, ET AL	STATE OF LOUISIANA

JUDGMENT

This matter was called for trial on the merits beginning on April 2, 1996. All parties were present in court represented by their attorneys of record and the case was tried to a conclusion. After considering the testimony and evidence presented and for the reasons assigned in the furling of the court dated May 3, 1996 and filed May 8, 1996.

IT IS ORDERED ADJUDGED AND DECREED THAT the lawsuit of the plaintiff, ALANA SUDWISHER be dismissed at the cost of the plaintiff.

Lafayette, Louisiana, this 6th day of June, 1996.

HON. JUDGE JULES D. EDWARDS, III

APPROVED AS TO FORM:

STEPHEN A. STEFANSKI
Attorney for Plaintiff

JOHN F. CRATON
Attorney for Defendants.

APPENDIX F

ALANA SUDWISHER	15TH JUDICIAL DISTRICT COURT
VERSUS NO. 47796	PARISH OF ACADIA
ESTATE OF PAUL C. HOFFPAUIR, ET AL	STATE OF LOUISIANA

****

RULING

This instant matter came before this Court as a bench trial on April 2, 1996. Plaintiff, Alana Sudwisher, brought this suit to be recognized as an heir and to be placed in possession of an undivided 1/3 interest in the estate of Paul C. Hoffpauir, Sr. (Hereinafter sometimes referred to as "Hoffpauir"). Plaintiff alleges that she is the product of an illicit relationship between Paul C. Hoffpauir, Sr., and her mother, Joyce Elaine Moore. She contends that Hoffpauir supported his paramour and their child during his life, and it is only fair that his estate recognize the existence of his illegitimate child.

The parties presented two contrasting pictures of Paul Hoffpauir, Sr. The defendants suggest he was a kind, generous, honorable, family man. The plaintiff suggests that while this is true, Hoffpauir also lived a separate life with another "family".

The expert testimony presented at trial is ambiguous at best, and suggests that there is a high probability that Alana Sudwisher and Rosemary Schuh, Hoffpauir's biological daughter, are related. Alana Sudwisher, Lee Bertrand, and Brenda Bertrand, Betty John Cynthia Davis Penracky, and Marie Gaspard presented evidence that Hoffpauir participated in an illicit relationship that lasted several years and resulted in the birth of the plaintiff. Doris Wiggens Aycock, who worked as a sitter for Hoffpauir during his last period of illness, also testified by deposition. During that time period, says Aycock, Hoffpauir told her that he had "two children on this side of the track, and tow on the other side." Petitioner, Cynthia Davis Pendracky, and Marie Gaspard each testified that Hoffpauir

unambiguously acknowledged Alana as his child. Lee and Brenda Bertrand testified that Hoffpauir acknowledged Alana as his child in a more ambiguous fashion.

The Court also heard testimony from Betty John, aunt of the petitioner, who stated that her sister, Joyce Elaine Moore, maintained this adulterous relationship with Paul Hoffpauir, Sr. through three of her marriages to three different men, during at least a six year period. During tow of those years, according to Miss John, Hoffpauir visited the home of Joyce and Betty during the day and night for 3-6 hours, as often as four (4) times a week. John further testified that Hoffpauir named Alana, and acknowledged that she was his child.

On the other hand, Sara Jane Laramore, Rosemary Schuh, Guy Gardiner, Paul Hoffpauir, Jr., Allen Borde, Lucy Vincent, Elizabeth Inge and Rosemary Wright Hoffpauir each testified they were not aware of an illicit relationship between Paul Hoffpauir, Sr. and Joyce Elaine Moore, nor did they

have any knowledge of any illegitimate children of Hoffpauir. They further testified that they did not believe Hoffpauir had the time or inclination to engage in such a relationship.

The Court is not convinced that Paul C. Hoffpauir, Sr. continually or habitually acknowledged Alana Sudwisher as his daughter. Furthermore, this petitioner failed to provide evidence that Hoffpauir was generally reputed to be her father.

After reviewing the evidence in this case, the court finds that although it may be possible that the events occurred as described by the plaintiff, and that it may even be probable, but it certainly was not clearly and convincingly established. Paul C. Hoffpauir, Sr. did not continuously and unequivocally recognize this plaintiff as his own child. Hoffpauir may have led a double life, withholding any knowledge of this illicit relationship and its fruit from all but the closest friends and relations of the plaintiff, but the Court is not firmly convinced of the truth of this assertion.

For the reasons hereby assigned, this Court finds in favor of Defendants.

Signed in chambers this 3rd day of May, 1996.

Respectfully submitted,

Jules D. Edwards, III